No. 86-768

IN THE
SUPREME COURT OF THE UNITED STATES
October, Term, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM C. GOODING
Wheeler, Gooding & Dodson
310 Texarkana National Bank Bldg.
P.O. Box 1838
Texarkana, Texas 75504
(214) 794-3121
Of Counsel

DANIEL V. FLATTEN
JAMES L. WEBER
BRIAN R. DAVIS
Mehaffy, Weber, Keith & Gonsoulin
InterFirst Tower
P.O. Box 16
Beaumont, Texas 77704
(409) 835-5011

410 First Federal Plaza
10th & Brazos
Austin, Texas 78701
(512) 476-0825
Counsel for Petitioner

November 10, 1986

QUESTIONS PRESENTED

The Seventh Amendment assures petitioner's right to a jury decision of material fact issues in this civil damage action. The Judicial Code preserves an important adjunct: the right of peremptory challenges. The opinion by the Court of Appeals, affirming judgment against petitioner for over $2.5 million, concedes error in the trial court's jury instructions. The Court of Appeals also noted the disparity between the number of peremptory challenges allowed petitioner in contrast to the surplus allocated to respondents, particularly inasmuch as petitioner had to consume a strike to remove a venireman challenged unsuccessfully for cause. Yet the appellate court found no harm to petitioner by either error sufficient to warrant reversal for a new trial. The questions now presented are:

1. Did the Court of Appeals deny petitioner's Seventh Amendment right to trial by jury in concluding that, absent the erroneous instruction, the jury would have decided against petitioner anyway, even though, because of the error, the jury never passed on the fact issue now foreclosed by the appellate court?

2. Were petitioner's federal rights substantially impaired by trial court abuse of discretion in the apportionment of peremptory challenges or the denial of petitioner's challenge-for-cause, to the end that the case must be reversed for a new trial?

Rule 28.1 Listing

1. Mr. Albert Wayne Cox
2. Mr. Michael G. Cade
3. Missouri Pacific Railroad Company
4. Kansas City Southern Industries, Inc, (parent)
5. The Kansas City Northern Railway Company
6. The Kansas City Southern Railway Company
7. Louisiana & Arkansas Railway Company
8. The American-Coleman Company
9. American-Coleman International Corp.
10. The Arkansas Western Railway Company
11. Boston Financial Data Services, Inc.
12. Carland, Inc.
13. Cybertech, Inc.
14. DST, Inc.
15. DST Clearing, Inc.
16. DST-Computer-Services, S.A.
17. DST Securities, Inc.
18. Fort Smith and Van Buren Railway Company
19. Investors Fiduciary Trust Company
20. Joplin Union Depot Company
21. The Kansas and Missouri Railway and Terminal Company
22. Kansas City Southern Transport Company, Inc.
23. Kansas City Terminal Railway Company
24. Landa Motor Lines
25. Lonestar-KC Concrete Tie Company
26. Louisiana, Arkansas & Texas Transportation Company
27. The Maywood and Sugar Creek Railway Company
28. Midwestern Minerals, Inc.
29. Mid-America Television Company
30. Northern Properties Corporation
31. Pabtex, Inc.
32. Pioneer Western Corporation
33. Pioneer Western Energy Corporation

34. Pioneer Western Financial Corporation
35. Pioneer Western Financial Planning Corporation
36. Pioneer Western Management, Inc.
37. Pioneer Western Marketing Corporation
38. Reserve Realty
39. Rice-Carden Corporation
40. Rycom Instruments, Inc.
41. Southern Development Company
42. Supporet Systems, Inc.
43. Tolmak, Inc.
44. Trans-Serve, Inc.
45. Veals, Inc.
46. Wall Street Clearing Company
47. Western Reserve Financial Services Corp.
48. Western Reserve Life Assurance Co. of Ohio

TABLE OF CONTENTS

INDEX OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1986

NO.

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
ALBERT WAYNE COX, AND
MICHAEL G. CADE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Kansas City Southern Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, entered August 20, 1986.

OPINION BELOW

The opinion of the Court of Appeals is unreported and is reproduced at Appendix A, *infra.* Its unreported order denying the petition for rehearing and suggestion for rehearing en banc, entered October 1, 1986, is reproduced at Appendix B. By order dated October 14, 1986, reproduced at Appendix C, the Court of Appeals granted a stay of the mandate to and including November 13, 1986. The judgment reviewed by the Court of Appeals is unreported and reproduced at Appendix D, together with the verdict of the jury.

JURISDICTION

The jurisdiction of this Court to review the final judgment of the Court of Appeals is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Seventh Amendment:

> In suits at common law, . . . the right of trial by jury shall be preserved. . . .

Judicial Code, Title 28, United States Code, Section 1870:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

STATEMENT OF THE CASE

A. Trial Proceedings

Respondents Cade and Cox, employees of respondent Missouri Pacific, sued petitioner in diversity for damages on account of personal injuries. The applicable substantive law is that of Texas, pursuant to which petitioner brought its third-party action for contribution against Missouri Pacific.

Both Cade and Cox sustained back injuries in jumping from the locomotive of their Missouri Pacific train about 400 feet ahead of what turned out to be a relatively minor collision with petitioner's train, which was being flagged through an "interlocker" crossing shared by the railroads. Cade and Cox contended that petitioner had negligently failed to observe proper precautions for entering the interlocker against a red signal and that, although they had thrown their emergency brake at a point 1,628 feet ahead of the intersection, the enormity of their fear of collisiion justified their jump and substantial damages against petitioner. Although suit against Missouri Pacific under the Federal Employers Liability Act, 45 U.S.C. Sec. 51, was available, Cade and Cox sued only petitioner.

Petitioner's third-party action against Missouri Pacific is governed by a Texas statute, Tex. Civ. Prac. & Rem. Code, Sec. 33.011 *et seq.* (formerly Tex. Rev. Civ. Stat. Ann. Art. 2212a), which authorized petitioner to pursue contribution in proportion to such percentages of negligence as the jury should elect to assign to petitioner and Missouri Pacific, respectively, as having proximately caused the accident. *Id.*, Sec. 33.012. Petitioner presented several theories against Missouri Pacific, chief among which was the latter's undisputed operation of its 85-car train with inoperable power brakes on at least six cars, some with their air valves closed. Invoking 45 U.S.C. Sec. 9 and that statute's current implementing regulation, 49 C.F.R. Sec. 232.1,[1] petitioner urged that Missouri Pacific's inoperable brakes constituted negligence and negligence *per se* under Texas law and a proximate cause of the injuries. By concession of Missouri Pacific's own expert, six cars with bad brakes lengthened its train's stopping distance 56 feet. (Tr. II, 39–40). Other testimony and physical evidence would have permitted a trier of fact to find that Missouri Pacific's inoperable brakes lengthened its stopping distance by as much as 300 feet over what would have been required with working power brakes on all cars. (Tr. I, 58, 79; Tr. II, 145, 190–91, 195). Under either version there would have been no collision or even near-collision. (Tr. I, 127, 181).

---

[1] The cited regulation provides:

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and opeated by the engineer of the locomotive drawing such train, and *all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.*

(Emphasis added).

This regulation is reinforced by 49 C.F.R. Sec.232.11(c), which adds that "at no time shall the number and location of operative air brakes be less than permitted by Federal requirements."

The suit was tried in the United States District Court for the Eastern District of Texas before a jury of six, selected from a panel of 20. At voir dire, both the plaintiffs, Cade and Cox, and third-party defendant Missouri Pacific asserted that petitioner was solely at fault but Missouri Pacific purported to "deny the nature and extent of the injuries and damages" to Cade and Cox. (First Supplemental Rec. 9–11, 29–31). Over petitioner's objection, the trial court awarded Cade and Cox, jointly, four peremptory challenges, two to Missouri Pacific, and two to petitioner. (Second Supplemental Rec. 2–3).

Petitioner shortly had to use one of its two to remove a panelist whom the trial court refused to excuse for cause. The panelist had discussed the case "at various times" with a Missouri Pacific employee's (a listed potential witness) mother-in-law and admitted that he "might be influenced" by what he had heard from her. (First Supplemental Rec. 22, 26). Cade and Cox exercised all four of their strikes, Missouri Pacific neither of its two. Petitioner exhausted its strikes.

Once the jury was seated and the trial began, all traces of the ostensible adversity that Missouri Pacific had indicated as against the plaintiffs at voir dire evaporated. The Missouri Pacific did not cross-examine any of the plaintiffs' doctors or damage witnesses nor offer any evidence about their damages nor question the plaintiffs' claims in argument. Indeed, Missouri Pacific's counsel emphatically urged the jury to award Cade and Cox the full sums displayed on their lawyer's jury argument chart, nearly $3 million. (Tr. II, 258).

The case was submitted to the jury on an oral charge and written verdict interrogatories. The oral charge contained the "15%" excuse instruction regarding Missouri Pacific's inoperable brakes, an instruction which the Court of Appeals admitted "is inconsistent with the regulations." In response to verdict question 3, the jury answered "No" to the issue whether Missouri Pacific's "[a]llowing the train to operate with defective brakes" was negligence. The jury accordingly did not reach the issues of proximate causation or percentage apportionment as between petitioner and Missouri Pacific. (Rec. 206–07, Appendix D). The jury assigned 100% of the responsibility to petitioner and awarded Mr. Cade $1,716,000.00 in damages, $850,000.00 to Mr. Cox. (*Id.*, 207–08).

B. Appellate Proceedings

In the Court of Appeals, petitioner renewed its objections to the erroneous charge and to the trial court's misallocation of peremptory challenges, aggravated by the denial of petitioner's challenge-for-cause. In the former respect, Texas law holds that "[t]he unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injury to the class of persons to which the injured party belongs." *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 549 (Tex 1985); see *Missouri Pacific R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). Negligence *per se* having been established prima facie by Missouri Pacific's undisputed violations of 45 U.S.C. Sec. 9 and 49 C.F.R. Sec. 232.1, the burden shifted to Missouri Pacific to offer evidence of an "impossibility, incapacity or emergency" as an excuse. *Moughon v. Wolf*, 576 S.W.2d 603, 605 (Tex. 1978); *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 697 (Tex. 1972). Missouri Pacific offered none.[2]

"In the absence of some evidence of legally acceptable excuse, [petitioner] had no further burden to request an issue and prove the case by a common law negligence standard." *Moughon v. Wolf, supra*, 576 S.W.2d at 606. In short, the question whether Missouri Pacific *was negligent* should have fallen out of the case, the jury to consider only proximate cause and percentage apportionment.

---

[2]Nor was there any contention or evidence that the train was being hauled to the nearest repair point for the purpose of making repairs, a theory accepted as a defense to civil penalties in *United States v. Northern Pacific Ry. Co.*, 77 F.2d 587, 590 (9th Cir. 1935). The Missouri Pacific made no effort to account for the inoperable brakes and cut-out air valves. The evidence is undisputed that, during a stop en route prior to this accident, the Missouri Pacific crew failed to complete a visual inspection of the brakes, undertaken after the train unexpectedly went into emergency. (Tr. I, 74–75, 137, 141.) The inspection was cut short because Mr. Cade, the engineer, was in a hurry. (Tr. I, 50, 137).

Petitioner also called abundant other authorities to the appellate court's attention, sufficient to demonstrate the acknowledged error of the "15%" excuse portion of the charge. E.g., *Fairport, P.&E.R. Co. v. Meredith,* 292 U.S. 589, 596 (1934) (pre-*Erie* Ohio case; motorist at highway crossing held protected against collision); *New York Central R. Co. v. United States,* 265 U.S. 41, 46 (1924); *Zavorka v. Union Pacific Railroad Co.*, 690 P.2d 1285, 1287 (Colo. App. 1984) (railroad employee protected); *Missouri-Kansas-Texas R. Co. v. Evans,* 250 S.W.2d 385, 388 (Tex. 1952) (same); *United States v. Atchison, Topeka and Santa Fe Railway Co.*, 205 F. Supp. 589, 591 (S.D. Cal. 1962); *United States v. Panhandle & S.F. Ry. Co.*, 21 F. Supp. 919, 921 (N.D. Tex. 1937); ICC Report, U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess. 1958, at 2345 ("Inoperative train brakes associated together with operative brakes are in violation of the law.").[3]

---

[3]The same ICC report confirms the Commission's consistent interpretation of the law to the effect that orders issued since 1910 had "had the effect of increasing this percentage to 100 percent" and that "all such [power-braked] cars associated together must have their brakes used and operated." See ICC Order 13528, as amended, 17 Fed. Reg. 8653 (Sept. 30, 1952); 17 Fed. Reg. 8957 (Oct. 7, 1952); 17 Fed. Reg. 10738 (Nov. 26, 1952).

That administrative interpretation of 45 U.S.C. Sec. 9 by the enforcing agency is entitled to great deference, *Udall v. Tallman,* 380 U.S. 1, 16 (1965), which is enlarged by the Congress's acceptance of the Commission's interpretation in reenacting the statute in 1958. *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 134 (1978); *Albemare Paper Co. v. Moody,* 422 U.S. 405, 414 n. 8, 431 (1975).

It suffices for present purposes to observe that, irrespective whether judged in terms of the Texas negligence *per se* doctrine or a common-law standard of ordinary and prudent care, Missouri Pacific could not defend the erroneous charge in the Court of Appeals. The "15%" paragraph simply should not have been in the charge, as it deflected the jury from applying the correct substantive law to the evidence. Missouri Pacific argued, instead, that there was "no causal relation" between its inoperable brakes and the emergency as Cade and Cox perceived and reacted to it. Apparently the Court of Appeals succumbed, indeed as a matter of law, since the appellate court found the challenged instruction harmless error:

> The instruction KCS challenges could not have affected the outcome of the case. Cade and Cox did not jump from the locomotive because of a real or imagined fear of the loss of braking power on their train; they did their quick exit because they saw they were sharing the track with another behemoth. In that setting, it is manifest that the questioned charge occasions no basis for reversal.

The Court of Appeals separately rejected petitioner's complaints of inadequate peremptories (conversely, that Cade and Cox had received one too many) and denial of the challenge-for-cause. The appellate court held that petitioner failed to show prejudice by failing to make a "convincing showing that the additional peremptory challenge would have been used." It found no evidence that petitioner had been forced to take an objectionable juror due to consumption of a peremptory to remove the panelist to whom its challenge-for-cause was denied. The court did not address at all petitioner's contention that the *tandem effect* of inadequate peremptories and denial of the challenge-for-cause worked an impermissible substantial impairment of the right of peremptory challenges.

REASONS FOR GRANTING THE WRIT

This is an important, writ-worthy case, not because the Fifth Circuit misapplied Texas law or because it involves a lot of money. Those collateral difficulties are obvious enough, but on closer analysis it becomes undeniable that the decision works serious mischief to the fair administration of jury trials in the district courts. On one hand, the Court of Appeals has done something that neither the trial court nor the litigants considered justified: it has ordered a directed verdict against petitioner on the jury issue of proximate causation arising from Missouri Pacific's inoperable power brakes. On the other, it has embraced—indeed entangled itself in—the illusory notion that a denial of peremptory challenges at trial should be judged on appeal according to whether jurors who heard the case were actually biased against the complaining party. That approach not only tries to mix water and oil but its very premise—that such a showing is feasible—is specious.

1. The Seventh Amendment bars the Court of Appeals from holding that, absent erroneous instructions, the jury still would have found no liability against Missouri Pacific, especially where, as here, the error prevented the jury from reaching the fact issue—proximate causation—preempted by the appellate court.

The Fifth Circuit's treatment of the erroneous "15%" excuse instruction is an artful exercise in appellate fact finding masquerading as harmless error verbiage, F.R. Civ. P.61. Regardless of the facial merit of the court's argument that an erroneous charge should be held harmless if it "could not have affected the outcome of the case," that argument cannot justify appellate preclusion of a trial by jury where the jury never reached the part of the case in question precisely because the error stood in the way.

In truth, no one—certainly not the Court of Appeals—knows what the jury would have decided as to Missouri Pacific's negligence and proximate causation if the trial court had omitted the challenged instruction. Six bad-braked cars out of 85 is only 7%, well within the erroneous 15% factor in the charge, but

wholly outside the number permitted by law. "Section 9 [of Title 45, United States Code] is violated whenever even one car, connected on the air brake line, does not have its air brakes operative." *United States v. Atchison, Topeka and Santa Fe Railway Co., supra,* 205 F. Supp. at 591.

The Court of Appeals simply speculated its way to a *factual* result. But it is for the jury—only the jury—to decide whether and to what extent the Missouri Pacific train's shortage of braking power affected Cade's and Cox's decision to jump. Would those men have felt equally impelled to an identical "quick exit" if their train's power brakes had functioned on all the cars, whereby a full stop would have been achieved at least 56 feet, perhaps as much as 300 feet, ahead of where their defectively-braked train actually came to rest? Without a doubt, the inoperable brakes had a direct impact on the men's thought processes in their perception of the danger and reaction to it.[4] Yet the jury was diverted by a decidedly-erroneous instruction from making a proper evaluation of the evidence in terms of Missouri Pacific's negligence, and now the Court of Appeals has terminally usurped the jury's prerogative to decide the extent to which that negligence contributed to the fear that motivated Cade and Cox to jump.

---

[4]Cade and Cox testified that their train was at a point 1,628 feet ahead of the crossing when they applied the emergency. (Tr. I, 58, 79, 114). Missouri Pacific's speed tape indicated that the train's speed was 41 m.p.h. when placed into emergency and that 25 seconds elapsed to a full stop from the time the tape registered a speed reduction. (Tr. II, 139-40, 145). According to Missouri Pacific's interpretation of the tape, the train travelled a quarter-mile (1,320 feet) during the 25 seconds. (Tr. II, 143). Given that Cade and Cox had already reacted to the need to apply the emergency by the time they threw the switch ("reaction time"), the jury was entitled to decide whether bad brakes on six cars were a cause in fact, its consequences foreseeable to Missouri Pacific in case of an obstructed right-of-way, of 308 feet of unbraked, unaccounted-for slack travel (1,628 minus 1,320). Had the brakes reduced the train's speed up to 300 feet sooner, Cade and Cox should not have felt a similar compulsion to jump 1,200 feet later.

Significantly, the erroneous instruction aside, the trial judge considered Missouri Pacific's negligence and proximate causation for operating with bad brakes to be legitimate jury issues upon which reasonable minds might differ. Apparently Missouri Pacific agreed, as it proceeded with its evidence without moving for a directed verdict at the conclusion of petitioner's case. (Tr. II, 100); F.R. Civ. P. 50(a). Hence, not only has the Court of Appeals effectively directed a verdict against petitioner in violation of the Seventh Amendment,[5], it has done so contrary to what the trial judge and the litigants contemporaneously recognized as a classic jury case. Under Texas law, Missouri Pacific's negligence need not have been found the sole cause of the accident for liability to attach in contribution, only a concurring cause, 1% to 99%. Tex. Civ. Prac. & Rem. Code, *supra*, Secs. 33.012, 33.013; *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903-04 (Tex. 1980); *Missouri Pacific R. Co. V. American Statesman, supra*, 552 S.W.2d at 103-04.

An essential characteristic of civil justice in the federal courts is the Seventh Amendment's assignment of disputed fact issues to the jury. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958). This Court's discussion in *Curtis v. Loether*, 415 U.S. 189, 194 (1974), applies squarely to petitioner's right to a jury trial of its claim for contribution:

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

---

[5]Compare *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935), with *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913); Advisory Committee Note to Subdivision (a), F.R. Civ. P.50.

If anything, the Fifth Circuit's abuse of petitioner's right to trial by jury is more flagrant than the federal appellate decision reversed by this Court in *Byrd.* Unlike *Byrd,* this case presents no conformity conflict between the policy of the Seventh Amendment, which favors jury trial, and a contrary, arguably-substantive State rule of practice that *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), would bind a federal court to follow. Petitioner would have received a full jury determination of Missouri Pacific's share of the fault in a Texas court. The contribution statute itself contemplates jury trial of each tortfeasor's percentage. Cf. Tex. Civ. Prac. & Rem. Code, *supra,* Sec. 33.014 (authorizing jury determination of a settling tortfeasor's percentage). Multi-party negligence suits, when tried, are routinely tried to juries in Texas, and the jury decides the contribution claims as well as the principal liability. It follows that the Fifth Circuit's misuse of harmless error analysis to work a denial of Seventh Amendment rights has no support in any affected jurisdiction's substantive policy. The Court of Appeals should have simply corrected the trial court's concededly-erroneous charge by ordering a new trial under proper instructions instead of compounding it into federal constitutional error.[6].

In conclusion, the Court of Appeals has arrogated to itself the fact-finding role that the Constitution reposes in the jury. In its insistence to conclude the substantial fact issues of Missouri Pacific's causal fault, the appellate court lost sight of its responsibility to correct prejudicial legal errors occurring in the trial court. Its judgment must be reversed and remanded for a new trial of petitioner's claim for contribution against Missouri Pacific.

2. A substantial impairment of the right of peremptory challenges is a denial of peremptory challenges. A trial court's discretion in administering challenges is neither unfettered nor to be shielded by unreasonable, cynical obstacles to appellate review.

---

[6]Petitioner assigned the appellate court's Seventh Amendment error in the petition for rehearing and suggestion for en banc hearing, which represented the earliest stage at which the point could be raised in the lower court.

The Court of Appeals rejects petitioner's jury selection complaints with a series of generalizations, none of which need be disproven to show that the court grasped at straws to evade the problem. The peremptory challenge is one of the most important and valuable rights of a litigant. *Swain v. Alabama,* 380 U.S. 202, 220 (1965). Petitioner demonstrated prejudice. Petitioner (i) duly made its objection to the 4-2-2 misallocation known to the trial court and counsel; (ii) had to consume one of its two strikes to remove a panelist with extrajudicial knowledge about the case and familiarity with a potential witness after denial of its challenge-for-cause; (iii) exhausted its allowed strikes; (iv) had to accept a juror who knew the plaintiffs' attorneys personally and from business as well as a juror with a history of painful slipped discs[7]; and (v) watched a trial unfold in which the Missouri Pacific aligned itself with Cade and Cox on every issue, including the amounts of their damages, contrary to its representations in chambers and at voir dire.

By any objective view, the trial court's apportionment of strikes coupled with its denial of petitioner's challenge-for-cause denied petitioner a fairly-constituted jury. In practical terms the defense got only one-fourth the number of strikes exercised by the offense. This was brought about because the trial court was led to exercise an unreasoned or misinformed discretion. A similar abuse was reversed in *John Long Trucking, Inc. v. Greear,* 421 F.2d 125, 128 (10th Cir. 1970), in which the court observed:

> Refusal upon request to exercise the statutory discretion may very well result in substantial impairment of the ancient right with consequent denial of the constitutional right to a fair and impartial jury.

One more peremptory challenge would have effectively brought the defense to half instead of one-fourth the strikes exercised by the offense in this multi-party common accident case. In *Photostat Corp. v. Ball,* 338 F.2d 783 (10h Cir. 1964), several prospective jurors had refused to answer questions about prior injury claims because they thought the judge only meant lawsuits. The appellate court reversed and remanded for a new

---

[7]First Supplemental Rec. at 19 (Mrs. Stevens), 24 (Mr. Campbell).

trial even though it found that the trial court "could have justifiably denied a challenge for cause." *Id.* at 785. The error is analogous here in that the denial of petitioner's challenge-for-cause, though it might be affirmed in a vacuum, had the actual effect of substantially impairing petitioner's right of peremptory challenges.

In summary, and contrary to the Fifth Circuit's treatment, the point does not turn on the lack of a statutory prescription for mathematical equality nor on the trial judge's presumed finding that the challenged juror harbored no actual bias. It boils down, instead, to the plain fact that petitioner ended up with, effectively, only one strike to use in rejecting jurors for *suspected* bias or prejudice. The words of the Tenth Circuit in *Photostat* are in point, 338 F.2d at 784:

> No one will gainsay that the denial or substantial impairment of the statutory right of peremptory challenges is prejudicial to the constitutional right to a fair and impartial jury.

The trial court's errors in allocating peremptory challenges in tandem with the denial of petitioner's challenge-for-cause were prejudicial to petitioner's statutory and constitutional right to a fair and impartial jury. Petitioner has shown prejudice—as much as an appellate court could realistically require in evaluating a denial of peremptories. By definition, they effectuate suspicion and instinct. The litigant exercises them arbitrarily; proof of disqualification is unnecessary. Petitioner submits that the judgment of the Court of Appeals must be reversed and remanded for a complete new trial.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, to the end of reversing the judgment of the Fifth Circuit and remanding the case to the trial court for a new trial of all issues or, alternatively, a new trial of petitioner's third-party action for contribution against the Missouri Pacific Railroad Company.

Respectfully submitted,

DANIEL V. FLATTEN
JAMES L. WEBER
BRIAN R. DAVIS
Mehaffy, Weber, Keith & Gonsoulin
InterFirst Tower
P.O. Box 16
Beaumont, Texas 77704
(409) 835-5011

410 First Federal Plaza
10th & Brazos
Austin, Texas 78701
(512) 476-0825

By _____
Daniel V. Flatten

Counsel for Petitioner

WILLIAM C. GOODING
Wheeler, Gooding & Dodson
310 Texarkana National Bank Bldg.
P.O. Box 1838
Texarkana, Texas 75504
(214) 794-3121

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed by United States mail, postage prepaid, to the attorneys for Respondents, Mr. Franklin Jones, Jr., P.O. Box 1249, Marshall, Texas 75670 and Mr. Mike A. Hatchell, P.O. Box 629, Tyler, Texas 75710, on this 11th day of November, 1986 at the time of filing with the Clerk. All parties required to be served have been served.

_____
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No.

ALBERT WAYNE COX,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Appellant.

* * * * * * * * *

MICHAEL G. CADE,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Third Party Plaintiff-Appellant,

versus

MISSOURI PACIFIC RAILROAD CO.,

Third Party Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Texas

---

(August 20, 1986)

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In this Texas diversity negligence case, Kansas City Southern (KCS) appeals a jury-verdict judgment, challenging the jury selection procedures, various evidentiary rulings, the jury charge, and the damages awarded. Finding no reversible error, we affirm.

Facts

In the pre-dawn hours of February 5, 1982, an eastbound Missouri Pacific (MoPAC) train and a southbound Kansas City Southern (KCS) train collided at a track intersecion near Texarkana, Texas. The KCS train first reached the intersection, sometimes referred to as the 341 interlocker, and stopped in response to a red light. When the light failed to change a KCS crew-member, suspecting an electronic malfunction, examined the interlocker box and then flagged the KCS train through the interlocker diamond.

In the meantime, the MoPAC train was proceeding on a green light which apparently resulted from a malfunction in the electronic traffic control system. The MoPAC engineer, Michael G. Cade, and head-brakeman, Albert Wayne Cox, saw the KCS train blocking the intersection. They responded to this situation by engaging the emergency brakes and jumping from their locomotive, about 400 feet prior to the point of impact between the two trains. Both sustained back injuries. The collision between the two trains was relatively minor, considering the potential.

Alleging that their injuries were directly and proximately caused by the negligence of the KCS employees in traversing the interlocker without following the prescribed rules, Cox and Cade filed the instant negligence complaint against KCS. KCS denied liability and filed a third-party complaint against MoPAC, alleging that MoPAC was negligent in its maintenance of the interlocker box and in operating a train with defective airbrakes.

In response to special interrogatories, the jury found that: (1) KCS was negligent in attempting to enter the interlocker and its negligence was a proximate cause of the injuries sustained by Cox and Cade; (2) Cade was not negligent for jumping from the train, nor was he negligent for failing to keep a proper lookout, for traveling too fast, or for wrongful application of the brakes; (3) Cox was not negligent for jumping from the train; (4) MoPAC was not negligent for its actions with reference to the interlocker box, or for allowing a train to operate with defective brakes, or for operating a train at excessive speeds; and (5) the negligence of KCS was 100% responsible for plaintiffs' injuries. The jury set Cade's damages at $1,716,000, and Cox's damages at $850,000. The trial court denied KCS's post-trial motions and this appeal followed.

Discussion

Jury Selection

The trial judge alloted two peremptory challenges to each plaintiff, and a like number each to KCS and MoPAC. KCS maintains that this constituted an unfair distribution of peremptory challenges, warranting a new trial, because MoPAC was actually aligned with Cox and Cade.

The allocation of peremptory challenges in a multiparty civil suit is governed by 28 U.S.C. § 1870 which provides:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

The statute contains no reference to mathematical equality for additional challenges. That allocation is a matter which rests in the trial court's sound discretion. **Moore v. South African Marine Corp.,** 469 F.2d 280 (5th Cir. 1972). In doing so, the court must consider the alignment of the parties, both *de jure* and *de facto.* In **Carey v. Lykes Brothers Steamship Co.,** 455 F.2d 1192 (5th Cir. 1972), we found no abuse of discretion where the trial court alloted the same number of peremptory challenges to the plaintiff and to the defendant and third-party defendant jointly. *Accord* **Goldstein v. Kelleher,** 728 F.2d 32 (1st Cir.), *cert. denied,* 105 S.Ct. 172 (1984); **Fedorchick v. Massey-Ferguson, Inc.,** 577 F.2d 856 (3d Cir. 1978) (denying rehearing *en banc*). In **Goldstein,** 728 F.2d at 38, the First Circuit opined that it would not reverse, even if it found an improper allocation, absent a convincing showing that the additional peremptory challenge would have been used.

We find no error requiring a new trial, since KCS has failed to demonstrate any prejudice. Further, the argument of KCS that plaintiffs and MoPAC were actually allies is not persuasive.

We likewise perceive no reversible error in appellant's claim that the district court erred for refusing to strike a potential juror for cause because he had heard about the accident. KCS claims prejudice because it was forced to expend a peremptory challenge to excuse that juror.

The trial court's discretion in ruling on for-cause challenges will be sustained absent a manifest abuse. **Dennis v. United States,** 339 U.S. 162 (1949). Simple exposure to information about the incident which is the subject of the trial, civil or criminal, does not automatically disqualify a potential juror. **Hale v. United States,** 435 F.2d 737 (5th Cir. 1970). *cert. denied,* 402 U.S. 976 (1971). A dismissal for cause is in order only when the information has resulted in a fixed opinion about the merits of the case. **Irvin v. Dowd,** 363 U.S. 717 (1961). We find no basis for such a finding in this record. The venireman in question satisfied the court that his knowledge would not affect his service as a juror if chosen. This venireman was excused by KCS, but we find only argument, unsupported by evidence, that it was forced to accept an otherwise objectionable juror because it had used a peremptory on this venireman. We find no merit in the selection-of-jury assignments of error.

Jury Charge

KCS maintains that the trial judge erroneously charged the jury and this erroneous charge misled the jury into finding MoPAC free of negligence:

> Finally, in the event that you have determined—aren't you glad tohear that word finally—finally in the event that you have determined that the Defendant KCS Railway is guilty of negligence in any respect, which is a proximate cause of the plaintiffs' injuries, it will also be necessary for you to consider the Defendant KCS Railway's contention that the negligence of Missouri Pacific Railroad was a contributing cause to the plaintiffs' injuries. Again, the Defendant KCS Railway has the burden of establishing by a preponderance of the evidence that the Defendant Missouri Pacific Railroad was guilty of negligence which was a proximate cause of the plaintiffs' injuries. Thus, you are instructed in connection with these contentions, that if you find the Defendant KCS Railway has established that the Defendant Missouri Pacific Railroad was guilty of negligence by failing to properly design or maintain the interlock signals in question, or in authorizing the engineer of the train involved in the accident to proceed at an excessive speed, or in failing to provide adequate brakes for the Missouri Pacific train in this accident, in this connection with the KCS Railway's contention that the train was operated with defective brakes, you are instructed that the brakes must be working properly on a freight train when it leaves its initial terminal. In this case, I believe it was the City of Palestine. If all brakes were not properly working when the train left Palestine, such was a violation of the law. If you find from a preponderance of the evidence, that the Missouri Pacific violated this law, such conduct is presumed to be negligence.
>
> In that event, you will determine whether such violation was a proximate cause of any injuries to the plaintiffs, since a law violation alone will not justify a verdict against the Missouri Pacific unless the violation was a proximate cause of the plaintiffs' injuries.

> You are further charged, however, that under the law a train, after leaving its initial terminal, is permitted to have in its consist or string of cars, cars with no brakes working, provided that the number of such cars does not exceed 15 percent of the number of cars in the consist. That is a funny word, I hadn't heard the word consist before, I finally figured out what they were talking about. They are talking about the train, the whole thing.

KCS does not challenge the correctness of the first paragraph, which comports with the applicable federal regulation, 45 C.F.R. § 232.12. KCS does challenge that portion of the final paragraph which instructs that a train may be operated even if as much as 15% of the consist has faulty airbrakes. This portion of the charge is inconsistent with the regulations. The issue before this court is whether this reference in the charge, considered against the entire charge, indeed the entire record, warrants a reversal for new trial. We conclude it does not.

The trial court is accorded wide latitude in fashioning its charge, and when considering whether a jury has been erroneously instructed, "we view the charge as a whole, in the context of the entire case, and we ignore technical imperfections." **Pierce v. Ramsey Winch Co.,** 753 F.2d 416, 425 (5th Cir. 1985). The question posed to us is not whether the charge was faultless, "but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues." **Id.** The instructions will pass muster if they are found to be "comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury." **Scheib v. Williams-McWilliams Co.,** 628 F.2d 509, 511 (5th Cir. 1980). *See also* **Bode v. Pan American World Airways, Inc.,** 786 F.2d 669 (5th Cir. 1986); **Armco Indus. Credit Corp. v. SLT Warehouse Co.,** 782 F.2d 475 (5th Cir. 1986); **Gideon v. Johns-Manville Sales Corp.,** 761 F.2d 1129 (5th Cir. 1985); **McNeese v. Reading and Bates Drilling Co.,** 749 F.2d 270 (5th Cir. 1985).

Even when we find an erroneous instruction, a reversal is not warranted if we conclude, "based upon the record, that the challenged instruction could not have affected the outcome of the case." **Pierce v. Ramsey Winch Co.,** 753 F.2d at 425 (*quoting* **Bass v. USDA,** 737 F.2d 1408, 1414 (5th Cir. 1984)).

The instruction KCS challenges could not have affected the outcome of the case. Cade and Cox did not jump from the locomotive because of a real or imagined fear of the loss of braking power on their train; they did their quick exit because they saw they were sharing the track with another behemoth. In that setting, it is manifest that the questioned charge occasions no basis for reversal.

Newly Discovered Evidence

Prior to trial, KCS sought discovery of MoPAC's "341 file," the maintenance file on the involved interlocker. At trial MoPAC tendered the wrong file. The trial judge found that MoPAC was innocent of intentional concealment. KCS now contends that the file constitutes the discovery of new evidence which mandates a new trial. We disagree. We agree with the trial judge's disposition of this issue. Having found MoPAC's action inadvertent, the trial court also found that when the error was discovered KCS failed to exercise due diligence to secure the correct file before closure of the evidence. No new trial is warranted under these circumstances. Nor is there any merit to KCS's contention that a new trial should be granted because a Federal Railroad Administration report could have been used to impeach the testimony of a MoPAC signal repairman. KCS had this report before trial. Even if it were truly newly-discovered evidence, a new trial is not in order simply because of newly discovered impeachment evidence. **Trans Mississippi Corp. v. United States,** 494 F.2d 770 (5th Circ. 1974). Likewise, there is no merit to KCS's demand for a new trial based on its contention that the evidence is overwhelmingly against the jury's finding that MoPAC was not negligent. The jury exercised its prerogative in fact-finding. We defer to those findings except in unusual circumstances. **Boeing v. Shipman,** 411 F.2d 365 (5th Cir. 1969) (*en banc*).

KCS contends that the trial court erred by excluding evidence of MoPAC's post-accident remedial modifications of the interlocker system. The trial court's ruling, consistent with Fed.R.Evid. 407[1], was correct. No MoPAC witness denied the feasibility of repairs and the evidence was not needed for impeachment.

Finally, KCS contends that the awards are so excessive as to require intervention by the court. In reviewing a jury's assessment of damages our role is sharply proscribed. We do not "grade" the jury's verdict. We accept the jury's verdict unless it is clearly and unequivocably unacceptable. As we stated in **Caldarera v. Eastern Airlines, Inc.,** 705 F.2d 778, 784, (5th Cir. 1983) (footnotes omitted):

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.

We are especially hesitant to disturb a verdict where, as here, the trial judge has refused to adjust it. "The jury's assessment of damages is even more weighted against appellate reconsideration, especially when . . . the trial judge has approved it." **Id.** at 783-84 (footnote omitted); **Shows v. Jamison Bedding, Inc.,** 671 F.2d 927 (5th Cir. 1982).

---

[1]1. Fed.R.Evid. 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the even less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Nor do we perceive any excessiveness attributable to an improper "unit of time argument" as contemplated in **Westbrook v. General Tire & Rubber Co.,** 754 F.2d 1233 (5th Cir. 1985). Counsel did not exhort the jury to evaluate the plaintiffs' projected periods of pain and suffering as a multiple of smaller time-equivalents or argue that the damages could be established by any mathematical certainty. While counsel suggested sums for mental anguish, pain, and suffering, he told the jury that the figures were merely suggestions. We find no unit-of-time taint as condemned in **Westbrook.**

On two occasions the court cautioned the jury that counsel's argument was not evidence and that they were to decide the amount of damages. Although the jury award is handsome, we cannot say that it is so excessive that it "shocks the judicial conscience." **Wood v. Diamond M Drilling Co.,** 691 F.2d 1165, 1169 (5th Cir. 1981). The trial court did not abuse its discretion in refusing to order a new trial or remittitur of the damage awards.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2103

ALBERT WAYNE COX,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Appellant.

* * * * * * * * *

MICHAEL G. CADE,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Third Party Plaintiff-Appellant,

versus

MISSOURI PACIFIC RAILROAD CO.,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 20, 1986 , 5 Cir., 198__ , ___ F.2d ___)

(October 1, 1986)

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

HENRY A. POLITZ
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Mr. Brian R. Davis
Attorney at Law
410 First Federal Plaza
Austin, TX 78701

No. 85-2103
– Albert Wayne Cox - vs - Kansas City Railway Co.

MANDATE STAYED TO AND INCLUDING
NOVEMBER 13, 1986

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Della M. Jones
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MICHAEL G. CADE /

VS. / M-83-98-CA

KANSAS CITY /
SOUTHERN RAILWAY COMPANY

ALBERT WAYNE COX /

VS. / M-82-229-CA

KANSAS CITY
SOUTHERN RAILWAY COMPANY

VS.

MISSOURI PACIFIC /
RAILROAD COMPANY

FINAL JUDGMENT

On the 29th day of October, 1984, came on to be heard the above entitled and numbered cause and after the Court and Jury heard the pleadings, evidence, and argument of counsel, the Jury was charged by the Court and retired to consider the verdict. Thereafter, on the 31st day of October, 1984, the Jury did return into Open Court its verdict, finding in favor of the Plaintiffs and against the Defendant, Kansas City Southern Railway Company, and assessing damages as follows:

MICHAEL G. CADE – $1,716,000.00

ALBERT WAYNE COX – $850,000.00

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Plaintiff, MICHAEL G. CADE, have and recover of and from the Defendant Kansas City Southern Railway Company the sum of ONE MILLION SEVEN HUNDRED EIGHT THOUSAND TWO HUNDRED SIXTY-EIGHT AND NO/100 DOLLARS ($1,708,268.00), together with interest thereon at the rate of ten and thirty three one hundreths percent (10.33%) per annum from the date hereof until the final satisfaction of this Judgment, together with all of his costs of suit.

It is further ORDERED, ADJUDGED, and DECREED that the Plaintiff, ALBERT WAYNE COX, have and recover of and from the Defendant, Kansas City Southern Railway Company, the sum of EIGHT HUNDRED FIFTY THOUSAND DOLLARS ($850,000.00), together with interest thereon at the rate of ten and thirty three one hundreths percent (10.33%) per annum from the date hereof until the final satisfaction of this Judgment, together with all of his costs of suit.

All costs in this behalf expended are taxed against the Defendant, Kansas City Southern Railway Company, for all of which execution shall issue.

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Kansas City Southern take nothing against Third Party Defendant, Missouri Pacific Railroad Company, and that Third Party Defendant, Missouri Pacific Railroad Company, recover all of its costs expended from Kansas City Southern Railway Company.

SIGNED this, the 15th day of November, 1984.

/s/ Louis D. Bunton
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

JONES, JONES, BALDWIN CURRY & ROTH
P.O. Drawer 1249
Marshall, Texas 75670

/s/ Franklin Jones, Jr.
By: Franklin Jones, Jr.

ATTORNEYS FOR PLAINTIFFS

MCHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, Texas 77704

By: James L. Weber

ATTORNEYS FOR KANSAS CITY SOUTHERN RAILWAY COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MICHAEL G. CADE

VS. M-83-98-CA

KANSAS CITY SOUTHERN RAILWAY COMPANY

CONSOLIDATED WITH
ALBERT WAYNE COX

VS. M-82-229-CA

KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

MISSOURI PACIFIC RAILROAD COMPANY

VERDICT

You are asked to answer the following questions based upon a preponderance of the evidence. Please answer "yes" or "no" unless the question specifically calls for a different response.

QUESTIONS

Question No. 1

Do you the jury find from a preponderance of the evidence that the defendant, Kansas City Southern Railroad was negligent in attempting to enter the interlocker on the occasion in question without following the procedure specified by the railroad, if they did, and that such negligence was a proximate cause of the Plaintiffs', Mr. Cox and Mr. Cade's injuries, if any? Please answer "yes" or "no".

Yes _____

If you have answered Question No. 1 above "yes", answer the following questins. If you have answered Question No. 1 "no" then you have entered a verdict for the Defendant, Kansas City Southern Railroad and there is no need to answer any further questions.

Question No. 2

Answer each question separately for each of the Plaintiffs. Answer "yes" or "no" as to whether Plaintiff was negligent in committing the following acts or omissions, and "yes" or "no" as to whether each Plaintiff was negligent in committing the following acts or omissions and "yes" or "no" as to whether such negligence, if any, proximately caused each Plaintiff's injury. Consider the Court's instructions regarding the definition of negligence and proximate cause.

Plaintiff–Michael G. Cade	Negligence	Proximate Cause
a. Jumping from the moving train at a time when a person of ordinary prudence would not have	NO	
b. Failing to keep a proper lookout	NO	
c. Traveling at an excessive rate of speed	NO	
d. Failing to make a timely and proper application of the brakes	NO	
Plaintiff–Albert Wayne Cox	**Negligence**	**Proximate Cause**
a. Jumping from the moving train at a time when an ordinary person would not have	NO	

Question No. 3

Answer "yes" or "no" as to whether the following acts or omissions, if any, of Defendant, Missouri Pacific were negligence and "yes" or "no" as to whether the acts or omissions of Defendant, Missouri Pacific proximately caused Plaintiffs' injury.

Do you find from a preponderance of the evidence that the Defendant, Missouri Pacific Railroad, independent of any acts or omissions of the Plaintiffs was negligent in committing any of the following acts or omissions:

	Negligence	Proximate Cause
a. Providing an inadequate push button in the interlock box or failing to properly maintain the same	NO	
b. Allowing trains to operate at speeds which do not give operators an adequate amount of time for stopping	NO	
c. Allowing the train to operate with defective brakes.	NO	

If you have answered "yes" to Question No. 1 above and have answered "yes" to both question of negligence and proximate cause, for any of the actions enumerated in Question No. 2 and 3, you must answer Question No. 4 and assess the percentage of negligence which proximately caused the Plaintiffs' injuries, if any. In answering you must make a comparison of fault for each Plaintiff's case and the total must equal 100%.

Question No. 4

What percentage of negligence that caused the Plaintiffs' injury, if any, do you find from a preponderance of the evidence to be attributable to each of the parties.

A. Plaintiff Michael G. Cade	0%
Defendant Kansas City Southern Railroad Company	100%
Defendant Missouri Pacific Railroad Co.	0%
Total	100%
B. Plaintiff Albert Wayne Cox	0%
Defendant Kansas City Southern Railroad Company	100%
Defendant Missouri Pacific Railroad Company	0%
Total	100%